As to what constitutes compulsory employment however, the provisions of the statutes vary so greatly that no uniform rule can be deduced from the cases. Thus a New York statute, providing that any unlicensed person piloting a vessel to or from the port of New York shall be deemed guilty of a misdemeanor punishable by fine or imprisonment, has been held to make the pilotage compulsory. *The China*, *supra*. The Massachusetts statute, on the other hand, provides for a forfeiture of the whole pilotage fees if a tender of services is refused, and that of Louisiana inflicts a penalty of one half the fees; both statutes have been regarded in *dicta* as not compulsory. *Martin* v. *Hilton*, 9 Met. (Mass.) 371 ;. *The Merrimac*, 14 Wall. 199. The same result was reached under a Pennsylvania statute by which a master is "required and obliged" to employ a pilot or forfeit one half the fees to a charitable organization. *Flanigen* v. *Washington Ins. Co.*, 7 Pa. St. 306. In England the forfeiture of the fees is generally held to make the pilotage compulsory. *The Maria*, 1 W. Rob. 95. Yet curiously enough a penalty of double the fees has been interpreted in the opposite. *Attorney-General* v. *Case*, 3 Price 302. A vague distinction has been attempted in these cases between the forfeiture of pilotage fees and a "penalty." STORY, AGENCY, 2nd ed., § 456a. It is impossible from such a conflict to determine a satisfactory rule; it seems, however, that American courts do not consider a provision as obligatory unless its breach is punishable as a misdemeanor. Certainly the interpretation of the Pennsylvania statute is an indication of such an intention.

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# RECENT CASES.

AGENCY — COMPULSORY PILOTAGE — NEGLIGENCE OF PILOT. — The defendant's vessel, under command of a licensed pilot, collided with the plaintiff's pier as a result of the pilot's negligence. The latter was employed under a New York statute which the court interpreted as compelling the employment of a pilot. The plaintiff sued for injury to his property. *Held*, that the defendant is not liable. *Homer Ramsdell Co.* v. *La Compagnie Générale Transatlantique*, 182 U. S. 406. See NOTES, p. 405.

AGENCY — MASTER AND SERVANT — INTENTIONAL ACT OF SERVANT. — A push-car belonging to a railroad company was in charge of a foreman who lent it after the day's work to X for the latter's own use. The plaintiff, while lawfully crossing the track, was injured by the negligence of X in running the push-car. *Held*, that the company is liable. *Erie R. R. Co.* v. *Salisbury*, 50 Atl. Rep. 117 (N. J., C. A.).

The act of the foreman was not merely a performance of the company's business in an irregular and unauthorized way; it clearly was entirely outside the scope of his employment, so that the company could not be held liable for the consequences of this as an affirmative act. *Robinson* v. *McNeill*, 18 Wash. 163; *cf. Fiske* v. *Enders*, 47 Atl. Rep. 681. In certain classes of cases, however, the master is under a duty to prevent certain things from happening, and if the servant to whom that duty is delegated, himself wrongfully causes one of those things to happen, the master may be held responsible, not for the doing of the act by the servant, but for the failure of the servant to prevent its being done. On this principle a railway company is liable for a wilful assault on a passenger by a train hand. *White* v. *Norfolk, etc., R. R. Co.*, 115 N. C. 631. The doctrine applies to the custody of dangerous instruments such as torpedoes. *Pittsburgh, etc., Ry. Co.* v. *Shields*, 47 Oh. St. 387. The principal case might be supported on this basis, but the doctrine has never been applied to the custody of non-dangerous instruments, and a closely analogous case held very reasonably that a push-car belongs to the latter class. *Branch* v. *International, etc., Ry. Co.*, 92

Tex. 288. No other ground is apparent on which to rest the decision of the principal case, which is therefore difficult to support.

BANKRUPTCY — PETITION OF CREDITORS — JOINING IN PETITION TO CURE DEFECT. — Under § 59 *b* of the Bankruptcy Act of 1898 "Three or more creditors who have provable claims against any person which amount . . . to five hundred dollars . . . may file a petition . . ." Under § 3 *b* "A petition may be filed . . . within four months after the commission of . . . [an] act [of bankruptcy]." § 59 *f* provides that "Creditors other than original petitioners may at any time . . . join in the petition . . ." Creditors whose claims amounted to less than five hundred dollars filed a petition against the defendant, and subsequently, more than four months after the alleged act of bankruptcy, other creditors sought to join in the petition in order to supply the deficiency. *Held*, that under § 59 *f* they may join and thereby validate the original petition. *In re Mackey*, 110 Fed. Rep. 355 (Dist. Ct., Del.).

Although by its express terms § 59 *f* may not provide for correcting a defect in the original petition, still the natural object of a clause permitting a joinder of other parties would seem to be to allow an original insufficiency to be thereby remedied. See *In re Romanow*, 92 Fed. Rep. 510. It would consequently seem proper to construe § 59 *f* as if the words "in order to validate the petition" were inserted. This construction is justified moreover by its results, for otherwise the filing of a petition, apparently valid but in fact defective, might cause other creditors to refrain from petitioning until too late. This interpretation avoids any objection on the ground that the other creditors joined more than four months after the act of bankruptcy. The petition was filed within the time required by § 3 *b*, and § 59 *f* expressly provides that other creditors may join "at any time." *In re Romanow*, *supra*, holding that a defect in the number of petitioning creditors may be cured by subsequent joinder, appears to be the only decision in point.

BANKRUPTCY — SURRENDER OF PREFERENCES — TIME OF RECEIPT. — The Bankruptcy Act of 1898, § 57 *g*, provides that "The claims of creditors . . . shall not be allowed unless . . . [they] surrender their preferences." In § 60 *a*, where certain judgments and transfers are declared to be preferences, no time is set within which such judgments or transfers must have been secured. A creditor who had received a preference more than four months previous to the filing of the petition against a bankrupt, sought to prove the remainder of his claim. *Held*, that he must surrender such preference before proving his claim. *In re Abraham Steers Lumber Co.*, 110 Fed. Rep. 738 (Dist. Ct., S. D. N. Y.).

There appears to be no contrary decision on the point, but earlier cases, in which the preference was given within four months, laid some stress on that fact. *In re Fort Wayne Electric Corp.*, 99 Fed. Rep. 400. A literal construction of §§ 57 *g* and 60 *a* undoubtedly leads to the conclusion reached by the court. It has however been contended that the effect of § 60 *a* is limited by other sections of the act, and especially by § 60 *b*, which makes voidable by the trustee preferences given, within four months before the filing of a petition, to one having reasonable cause to believe a preference was intended, thus imposing two additional qualifications. In a previous case the Supreme Court refused to consider a preference as defined by § 60 *a* to be limited by the second of these qualifications, and pointed out the just distinction between a preference which must be surrendered before claiming further payment from the trustee, and one which the trustee may recover although no such claim is made. *Pirie* v. *Chicago Title & Trust Co.*, 21 Sup. Ct. Rep. 906; see 15 HARV. L. REV. 232. The same reasoning applies to the principal case, which is further supported by one previous decision. *In re Jones*, 110 Fed. Rep. 736. Legislation should supply the remedy if any is needed.

CONFLICT OF LAWS — DAMAGES FOR BREACH OF CONTRACT. — A contract for the sale of Massachusetts land was made in New York and was to be performed there. The seller, through no fault of his, was unable to convey a good title. Under these circumstances, the law of New York and the law of Massachusetts provide different rules of damages. The buyer brought suit in Massachusetts. *Held*, that the law of New York governs the assessment of damages. *Atwood* v. *Walker*, 61 N. E. Rep. 58 (Mass.).

It has been held in Massachusetts that damages by way of interest for delay after demand pertain to the remedy, and are to be governed by the law of the forum. *Ayer* v. *Tilden*, 15 Gray (Mass.) 178. This is opposed to the great weight of authority.

*Peck* v. *Mayo*, 14 Vt. 33; *Gibbs* v. *Fremont*, 9 Ex. 25. In the principal case, however, the Massachusetts court adopts the rule that the law of the place of performance applies to all cases of damages, other than those for delay in payment. The reason for distinguishing the interest cases is not made very clear, but otherwise the decision seems correct on principle. A party to a contract gets originally the right to have the contract performed, See 8 HARV. L. REV. 27. When the contract is broken the law in force at the place of performance converts the right to performance into a right of action. See MINOR, CONFL. LAWS, § 205. Compensatory damages, being a mere measure of the right of action, ought therefore to be governed by the law of the place of performance. This view is supported by a *dictum* in *Northern Pacific R. R. Co.* v. *Babcock*, 154 U. S. 190. With this exception no authority, other than the interest cases, has been found.

CONFLICT OF LAWS — JURISDICTION IN TORT — DEATH CAUSED BY WRONGFUL ACT. — An English vessel, by reason of the negligence of those in charge of her, ran into a Norwegian vessel on the high seas, and as a result a Norwegian seaman was drowned. His personal representative sued the owners of the English vessel in England. *Held*, that the plaintiff has a right of action under The Fatal Accidents Acts. *Davidsson* v. *Hill*, [1901] 2 K. B. 606.

The decision goes on the ground that a foreigner as well as a British subject is entitled to the benefit of statutory remedies. The case is treated precisely as if the cause had arisen in England, and the question of the *lex loci delicti* is not adverted to. The result reached, however, is correct according to the curious doctrine of the English courts. Recovery is allowed in England for any act, whether or not actionable where committed, which is actionable by English law, unless it has an affirmative legal justification by the law of the place where it was committed. *Machado* v. *Fontes*, [1897] 2 Q. B. 231. In the principal case, the court would be warranted in assuming that the act complained of, even if committed in Norwegian jurisdiction, had no affirmative legal justification. *Cf. McDonald* v. *Mallory*, 77 N. Y. 546. The English rule is not followed in the United States. Here the *lex loci delicti* is held to govern the right to sue. *Le Forest* v. *Tolman*, 117 Mass. 109; *Northern Pacific R. R. Co.* v. *Babcock*, 154 U. S. 190. The fatal force having been applied on a Norwegian vessel on the high seas, the law of Norway would govern. *United States* v. *Davis*, 2 Sumn. (U. S. Circ. Ct.) 432; *McDonald* v. *Mallory*, *supra*. Consequently the plaintiff would fail unless the law of Norway allows personal representatives to sue for death by wrongful act.

CONSTITUTIONAL LAW — CONTROL OF CONGRESS OVER THE INDIANS — EMINENT DOMAIN. — *Held*, that an Act appropriating Indian lands for town-site purposes and providing for compensation to the Indians, is within the power of Congress. *Tuttle* v. *Moore*, 64 S. W. Rep. 585 (I. T., C. A.). See NOTES, p. 399.

CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — DEBT LIMIT EXCEEDED FOR NECESSARY PURPOSE. — A county seat having been destroyed by fire, the county, in order to rebuild the court house, issued warrants beyond the debt limit set by the constitution. *Held*, that the warrants are legal obligations because issued for something absolutely necessary. *Farquharson* v. *Yeargin*, 64 Pac. Rep. 717 (Wash.).

It has been held that in order to pay expenses which the constitution requires, warrants in excess of the constitutional debt limit may be issued. *Rauch* v. *Chapman*, 16 Wash. 568. This decision may perhaps be supported on the ground that the constitutional restriction ought not to be so construed as to make the constitutional mandate in any instance nugatory. In some jurisdictions obligations the assumption of which is compelled by statute are held not within the restriction. *Grant County* v. *Lake County*, 19 Or. 453. On the other hand, the opposite view is sometimes taken. *Barnard* v. *Knox County*, 105 Mo. 382; *Lake County* v. *Rollins*, 130 U. S. 662. The principal case is believed to be the first in which necessity other than that imposed by the constitution or by statute has been held to remove a debt from the constitutional restriction. If the decision means that the county authorities may judge of the necessity, the bars against extravagance which the people have placed in the constitution, are thrown down. If the court is to judge of the necessity, a check upon the counties is retained, but by compelling the court to decide a question of the sort usually belonging to the executive department to determine. There are decisions against the loose construction adopted in the principal case. *Prince* v. *Quincy*, 105 Ill. 138.

CONTRACTS — ILLEGALITY — RESTRAINT OF COMPETITION. — The plaintiff, being on the point of entering into a contract with a city to furnish paving material for a street, the defendant agreed to pay him a sum proportionate to the amount of material used in paving the street, provided the plaintiff would not enter into the said contract, nor sell any crushed rock within the city during the remainder of the year. *Held*, that such a contract is not void as against public policy. *Marshalltown Stone Co.* v. *Des Moines Mfg. Co.*, 87 N. W. Rep. 496 (Ia.).

The court seems to have based its decision entirely on the general rule holding illegal only those agreements in restraint of trade which are unlimited in time and space. This rule, however, has been applied almost entirely to contracts where one party agrees not to enter into a certain business in competition with the other. *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473. In such cases the courts desire, while protecting the public, to give as wide a freedom of contract to the parties as possible. See *Roussillon* v. *Roussillon*, 14 Ch. D. 351. On the other hand it has been almost invariably held that agreements to stifle competition in bids for public work are void as against public policy. *Hunter* v. *Pfeiffer*, 108 Ind. 197; *Gibbs* v. *Smith*, 115 Mass. 592. At least one sufficient reason for these decisions is that the public is directly interested in the work which is the subject of the bidding, and therefore in having the competition unrestricted. This reason would apply equally in the principal case to the agreement of the plaintiff not to enter into the contract with the city, for, although there does not appear to have been an advertisement for bids as in the cases cited, the result to the public is substantially the same. No authority exactly in point has been found. The view proposed makes the consideration on which the plaintiff relies illegal in part. This is sufficient to bar his suit. *Bishop* v. *Palmer*, 146 Mass. 469.

CORPORATIONS — DISSOLUTION — SURVIVAL OF ACTION. — An action against a corporation for libel was abated by the dissolution of the defendant through the expiration of its charter. By statute, the former directors held the corporation property after dissolution in trust for creditors and stockholders. *Held*, that the suit may be revived against the trustees. *Shayne* v. *Evening Post Pub. Co.*, 168 N. Y. 70.

The statute would seem to be merely declaratory and was not relied upon by the court. The word creditors, however, is broad enough to cover a claimant in tort. *Barling* v. *Bishopp*, 29 Beav. 417; see *Marstaller* v. *Mills*, 143 N. Y. 398, 401. No case in point unaffected by special statutes has been found, but one text-book at least may be cited in favor of the decision. ANG. & A., CORP., § 779 a. It was contended that the rule, *actio personalis moritur cum persona*, governed the case. The dissolution of a corporation, however, has not in all respects been treated like the death of a natural person. The latter event, at common law, extinguishes some actions, but others survive against the personal representative. The former extinguishes all actions at law, but in equity the corporation property after dissolution is a trust fund for creditors and stockholders. *Vose* v. *Grant*, 15 Mass. 505, 522; *Wood* v. *Dummer*, 3 Mason (U. S. Circ. Ct.) 308. In the principal case, therefore, the court is not restricting the operation of an ancient rule of law, but simply refusing to limit an equitable doctrine by applying an inequitable legal analogy. As the requirements of justice are clear, the decision ought to be accepted.

CORPORATIONS — PREFERENCE OF DIRECTORS. — An insolvent corporation conveyed all its property in trust to pay debts of the corporation due to the directors and debts for which they were sureties. *Held*, that other creditors may set aside the trust deed on the ground that a majority of the directors were preferred. *Nappanee Canning Co.* v. *Reid*, 60 N. E. Rep. 1068 (Ind.).

It has been held that the assets of an insolvent corporation which has not been dissolved, form a trust fund to be ratably distributed among its creditors. *Rouse v. Merchants' Nat. Bank*, 46 Oh. St. 493. That doctrine seems now, however, to be discredited, and generally a corporation, like an individual, may prefer certain of its creditors. MOR., CORP., §§ 802, 803; *Hollins* v. *Brierfield, etc., Co.*, 150 U. S. 371; 11 HARV. L. REV. 550. In jurisdictions where this is allowed, no sufficient reason appears why a corporation should not be able to prefer its directors, but a few such jurisdictions hold all preferences to directors illegal. *Beach v. Miller*, 130 Ill. 162; *contra*, *Levering* v. *Bimel*, 146 Ind. 545. There is also some authority for distinguishing as illegal a preference to a majority of the directors, on the ground that such a preference must have been secured partly at least by the votes of the preferred directors. *Love Mfg. Co.* v. *Queen City Mfg. Co.*, 74 Miss. 290; *contra*, *Worthen* v. *Griffith*, 59 Ark. 562. The objection to allowing directors to profit by their own

votes seems to be that they are thus tempted to manage the corporation business for their own personal advantage. But this objection, though making the acts in question voidable by the stockholders acting through the corporation, should not be available to persons toward whom the directors occupy no fiduciary relation. See *Sanford, etc., Co.* v. *Howe*, 157 U. S. 312. A creditor may generally proceed in bankruptcy, and other remedy should be left to the legislature.

DAMAGES — BREACH OF CONTRACT — PAYMENTS DUE IN FUTURE. — By contract between a material-man and a contractor, eighty per cent. of the contract price of materials to be furnished by the former during each month, was payable on the first of the following month, and the remaining twenty per cent. on completion of the building. The contractor made default in the eighty per cent. payments, and in consequence the material-man refused to proceed with the contract and sued immediately. *Held*, that the twenty per cent. became due at once and can be recovered with the eighty per cent. before completion of the building. *Mullin v. United States*, 109 Fed. Rep. 817 (C. C. A., Second Circ.). See NOTES, p. 397.

EQUITY — INJUNCTION AGAINST ENFORCEMENT OF ERRONEOUS DECREE. — A contractor sued in a federal court to enforce a statutory lien on a railroad. He properly prayed a sale of all the company's property and franchises; but the court, misconstruing the statute which created the lien, rendered a final decree against the company for a sale of a part of the road-bed. To restrain this sale, the company sought an injunction against the contractor in another federal court. *Held*, that the injunction should issue. *Connor* v. *Tennessee Cent. R. R. Co.*, 109 Fed. Rep. 931 (C. C. A., Sixth Circ.).

The court presumably does not hold the original decree void. The validity of a decree may be collaterally attacked only for lack of jurisdiction, and if the remedy asked was proper it is not a jurisdictional defect that the remedy given was unjustified. *Gum-Elastic Roofing Co.* v. *Mexico Pub. Co.*, 140 Ind. 158. Contrary holdings on this last point are confined almost entirely to *habeas corpus* cases, and a decision of the court which decided the principal case minimizes their force there. *De Bara* v. *United States*, 99 Fed. Rep. 942; see 9 HARV. L. REV. 287. The reasoning in the principal case is that, since the decree alone cannot and the statute does not remove the common law disability of the railroad company to convey its property separate from its franchises, a deed according to the decree will be void; and that equity should excuse the plaintiff from clouding its own title. On authority, however, equitable relief against the result of proceedings by the same parties in another court must have some further reason than irregularity or error in those proceedings; failing that, the former adjudication binds. *Bateman* v. *Willoe*, 1 Sch. & Lef. 201; *Marine Ins. Co.* v. *Hodgson*, 7 Cranch 332. That the decree deals with property specially exempt does not justify disregarding this rule of administration. *Crowley* v. *Davis*, 37 Cal. 268. From this it follows that the present plaintiff should be able to escape obedience to the original decree only by appeal.

EQUITY — TRUSTS — ASSIGNMENT OF WHOLE AMOUNT OF PARTIALLY PAID CLAIM. — The plaintiff assigned to the defendant a claim against an insolvent, upon which, before the assignment and unknown to both parties, payments had been made by the insolvent's assignee to the plaintiff's attorney. The defendant, learning these facts, induced the attorney to pay to him the amount so received. The plaintiff brought an action for reformation of the contract of assignment and for other equitable relief. *Held*, that he is not entitled to relief. *Curtis* v. *Albee*, 167 N. Y. 360. See NOTES, p. 401.

EVIDENCE — HEARSAY — COMPLAINTS OF RAVISHED CHILD TOO YOUNG TO TESTIFY. — The accused was indicted for rape upon a child too young to be a witness. *Held*, that testimony that complaints were made by the child shortly after the occurrence is admissible. *People* v. *Figueroa*, 66 Pac. Rep. 202 (Cal., Sup. Ct.).

When the prosecutrix has testified to the alleged criminal act, evidence that she made complaint shortly after the commission of the crime is admissible. *Commonwealth* v. *Cleary*, 172 Mass. 175. The rule rests upon the reason long ago stated by Lord Hale that such evidence corroborates the testimony of the prosecutrix. 1 HALE, P. C., 632, 633. Accordingly cases are numerous holding such evidence inadmissible unless the prosecutrix has testified. *Hornbeck* v. *State*, 35 Oh. St. 277. In California, however, the law seems fixed in accordance with the principal case. *People* v. *Barney*,

114 Cal. 554. The strongest argument in favor of the evidence is the difficulty of proving the charge in such cases without it. But the probative value of statements by so young a child is speculative, especially when, as in the principal case, the particulars of the complaint are not admitted. The distinction thus drawn between the fact of complaint and the particulars, though commonly adopted, is always unsatisfactory, and might well have been rejected where there is apparently a disposition to lay down a new and rational rule. See 11 HARV. L. REV. 199. The decision illustrates a tendency of modern courts to admit matter believed to be probative, disregarding the fixed rules of evidence.

INTERNATIONAL LAW — APPLICATION OF PENAL LEGISLATION TO FOREIGN MERCHANT VESSELS. — Section 24 of the Act of December 21, 1898 (30 U. S. Stat. 763) forbids the payment of a seaman's wages in advance to himself or any other person, and subjects the vessel on which the seaman has shipped to libel by the seaman for the amount of wages paid in violation of this statute. It is further provided that "this section shall apply as well to foreign vessels as to vessels of the United States." A seaman shipped on a British vessel in an American port, and part of his first month's wages was paid in advance to a shipping agency. He subsequently libelled the vessel. *Held*, that the application of this statute to foreign merchant vessels is within the power of the United States. *The Kestor*, 110 Fed. Rep. 432 (Dist. Ct., Del.); *contra*, *The Eudora*, 110 Fed. Rep. 430 (Dist. Ct., E. D. Pa.).

The jurisdiction of a state within its territorial waters is, potentially, absolute. See *Schooner Exchange* v. *McFaddon*, 7 Cranch 116. Exemption from jurisdiction exists only for convenience, and by virtue of the consent of the state; and it is allowed by recognized international usage only in the cases of foreign war vessels, and vessels belonging to a sovereign. *Schooner Exchange* v. *McFaddon*, *supra*; *The Parlement Belge*, 5 P. D. 197. Merchant vessels are regularly, in the absence of treaty stipulations, subject to local laws while in port. *United States* v. *Diekelman*, 92 U. S. 520. In some countries, a certain amount of immunity from local jurisdiction, as to things done on board, is granted to merchant vessels by the so-called "French rule." *The Newton and The Sally*, ORTOLAN, 1 DIPLOMATIE DE LA MER, 450; *The Tempest*, *ib.*, 455. The rule has not yet been generally adopted. See HALL, INTERNAT. LAW, § 57. It has been recognized by the United States under a treaty with Belgium. See *Wildenhus's Case*, 120 U. S. 1. The acts complained of in the principal case were not done aboard but ashore; there was no treaty calling for the application of the "French rule;" and it is further submitted that in any case, whatever immunity merchant vessels have enjoyed may be withdrawn by a state in the exercise of its sovereignty. By the statute in the principal case, Congress clearly showed an intention to exercise this potential authority. The decision in *The Eudora*, *supra*, is based on the fiction of extra-territoriality, which is discussed below.

INTERNATIONAL LAW — THE FICTION OF EXTRA-TERRITORIALITY. — *Held*, that an act of Congress cannot apply to a foreign merchant vessel in American waters, since such vessel is a part of the territory of the country to which she belongs. *The Eudora*, 110 Fed. Rep. 430 (Dist. Ct., E. D. Pa.).

The jurisdiction of a country was formerly regarded as co-extensive with its territory. Accordingly, to explain jurisdiction over vessels on the high seas it was said that they were part of their country's territory. The fiction was extended to vessels in the territorial waters of a foreign state whenever the latter did not choose to exercise its jurisdiction. See HALL, INTERNAT. LAW, § 48. It seems never to have been used, as in the principal case, for the purpose of denying the right of a state to exercise jurisdiction within its territorial waters. The fiction fails to explain the situation logically when a vessel sinks, or when a vessel belonging to a state whose boundaries are fixed by statute, sails beyond the boundaries so fixed. See DANA'S WHEAT., INTERNAT. LAW, 303, 304; see also *McDonald* v. *Mallory*, 77 N. Y. 546. The fiction is moreover unnecessary. Some law must govern a vessel at all times, and since there is no territorial law on the high seas, the law of the flag is the law most rationally to be applied. The reason for applying it ceases when the vessel comes where some territorial law is in force. Under those circumstances it is only when the state waives its jurisdiction, as it usually does in cases of war vessels or vessels of a sovereign, and may do in case of merchant vessels, that the law of the flag will govern. See *The Kestor*, 110 Fed. Rep. 432, and the discussion of that case above.

MORTGAGES — ASSIGNEE ASSUMING MORTGAGE DEBT — EXTENSION OF TIME BY MORTGAGEE. — A mortgagee contracted with the assignee of the mortgagor to extend the time on the mortgage. After the extended time had elapsed, the mortgagee sued the mortgagor on his original covenant. It appeared that the mortgagor was not actually injured by the giving of time. *Held*, that his liability is not thereby discharged. *Forster* v. *Ivey*, 21 Can. L. T. 550 (Can., Sup. Ct.). See NOTES, p. 398.

MORTGAGES — ASSIGNEE ASSUMING MORTGAGE DEBT — LIABILITY IN EQUITY. — A mortgagor assigned his interest to one who assumed the mortgage debt. Subsequently the mortgagee foreclosed, and, the land being insufficient to satisfy the debt, obtained judgment for the balance against the mortgagor. The latter sought in equity to enforce his assignee's promise to pay. *Held*, that he has no remedy in equity. *Thompson* v. *Lodge*, 58 Legal Intel. 428 (Phila. Co.). See NOTES, p. 398.

MUNICIPAL CORPORATIONS — ASSESSMENTS FOR LOCAL IMPROVEMENTS — INFERIOR WORK AS A DEFENCE. — A contractor, in carrying out a street improvement, failed to conform to the specifications of the ordinance authorizing the work, and the improvement was of less value than if the specifications had been followed. *Held*, that these facts are not available as a defence to one whose land was assessed for the improvement. *People* v. *Whidden*, 61 N. E. Rep. 133 (Ill.).

When land is assessed for local improvements, all conditions precedent to legally entering upon the work, such as filing of plans, publishing notice, and kindred matters, must have been strictly complied with. *Harper's Appeal*, 109 Pa. St. 9. Moreover, where the contractor was the real plaintiff, suing on tax-certificates, the defence urged in the principal case has been allowed. *Erie City* v. *Butler*, 120 Pa. St. 374; *contra*, *Fass* v. *Seehawer*, 60 Wis. 525. And in any case if the completed work is a materially different improvement from that for which the assessment was authorized, the levy is void. *Pells* v. *People*, 159 Ill. 580. But when this is not the case and the suit, as usually happens, is between the city and the tax-payer, objections to the quality of the work by persons assessed are not generally entertained after it has been completed and accepted. *Ricketts* v. *Hyde Park*, 85 Ill. 110; *Lowell* v. *Hadley*, 8 Met. (Mass.) 180. In such cases, if no fraud appears, the tax-payer cannot question the discretion of the municipal officials. See *State* v. *Jersey City*, 29 N. J. Law 441, 449. Before completion and acceptance, persons interested may compel adherence to specifications by injunction or mandamus. *People* v. *Green*, 158 Ill. 594, 597. The decision in the principal case is necessary to avoid trivial pleas which would seriously interfere with the collection of assessments.

PROCEDURE — TRIAL OF FELONY — PRESENCE OF ACCUSED. — On a trial for felony, before the entrance of the prisoner into court, a witness was asked her name and that of her husband; the absence of the prisoner was then noticed and he was brought into court and the same questions were asked and the same answers given. *Held*, that the taking of such testimony in the absence of the accused constituted reversible error. *State* v. *Sheppard*, 39 S. E. Rep. 676 (W. Va.).

The rule that in a trial for felony the accused must be present at every stage of the proceedings, is one of the fundamental principles of the common law and has frequently been reinforced in this country by statutory enactments and constitutional provisions. *French* v. *State*, 85 Wis. 400; *Maurer* v. *People*, 43 N. Y. 1. Though the reasons for the rule are far less strong in modern times, it is still strictly enforced. See 11 HARV. L. REV. 409. But courts ought to apply the rule rationally, and not, for technical but immaterial violations, subject the state to the expense and the delay of justice caused by a re-trial. *People* v. *Bragle*, 88 N. Y. 585. If there is a particle of doubt as to whether the error might possibly prejudice the accused, reversal is justifiable; but in the principal case no harm to the accused could result, and the blind adherence to the letter of the rule necessarily tends to injure the standing of the courts and the law in popular estimation.

PROPERTY — AUXILIARY ADMINISTRATION — PAYMENT TO FOREIGN ADMINISTRATOR. — A savings bank in New York paid over the sum standing to the credit of a deceased non-resident depositor, to the domiciliary administrator. An auxiliary administrator previously appointed in New York, sued the bank for the amount of the deposit. *Held*, that the payment to the foreign administrator is no bar to the action. *Maas* v. *German Savings Bank, etc.*, 36 N. Y. Misc. 154 (Sup. Ct., App. Term).

Letters of administration have no extra-territorial effect, and confer upon the per-

son appointed no rights as administrator in any foreign court, except where such rights are given him by statute of the foreign state. *Goodwin* v. *Jones*, 3 Mass. 514. He may, however, under certain circumstances, accept voluntary payments within a foreign jurisdiction, and give a valid discharge. *Wilkins* v. *Ellett*, 9 Wall. 740. This privilege is commonly granted whenever no auxiliary administrator has been appointed. But being extended merely by comity, it might well be denied whenever the interests of resident creditors are at stake. See *Parsons* v. *Lyman*, 20 N. Y. 103. Upon application of any such creditors an auxiliary administrator will be appointed, who then has exclusive authority over all assets within the jurisdiction, superseding that of the domiciliary administrator. *Reynolds* v. *McMullen*, 55 Mich. 568. He may even demand from the latter all evidences of these assets. *McCully* v. *Cooper*, 114 Cal. 258. Any subsequent payment to the foreign administrator upon such debts would logically be no bar to an action by the auxiliary administrator, and so it was decided in the only cases directly in point which have been found. *Walker* v. *Welker*, 55 Ill. App. 118; *Stone* v. *Scripture*, 4 Lans. (N. Y.) 186.

PROPERTY — DEEDS OF INSANE PERSONS. — *Held*, that the deed of an insane person is absolutely void. *Daugherty* v. *Powe*, 30 So. Rep. 524 (Ala.); *Wilkinson* v. *Wilkinson*, 30 So. Rep. 578 (Ala.).

The prevailing rule is that deeds of insane persons are merely voidable. *Allis* v. *Billings*, 6 Met. (Mass.) 415; *Eaton* v. *Eaton*, 37 N. J. Law 108; *Riggan* v. *Green*, 80 N. C. 236. The Alabama decisions above, however, are well supported by authority. *Thompson* v. *Leach*, 3 Mod. 301; *Matter of Desilver*, 5 Rawle (Pa.) 111; *Van Deusen* v. *Sweet*, 51 N. Y. 378. The conflict is doubtless largely due to the confusion in the use of the words void and voidable. See *State* v. *Richmond*, 26 N. H. 232, 237. It has been maintained that a lunatic is incapable of the mental act requisite for a contract or a deed. *Dexter* v. *Hall*, 15 Wall. 9, 25. The modern tendency, however, makes the case of an insane person similar to that of an infant. The mental weakness of the one, like the immaturity of the other, makes it easy for unscrupulous persons to gain an unfair advantage. The law as a matter of policy protects the infant by allowing him to avoid his contracts at his election without denying him the benefit of such as are to his advantage, and insane persons would seem entitled to the same treatment. Of course where adjudication statutes vest the lunatic's property in a committee, the deed of one adjudged insane is a nullity. *Griswold* v. *Butler*, 3 Conn. 227, 231. Otherwise justice is best served by making the deed merely voidable.

PROPERTY — DETERMINATION OF CLASS — DEVISE OF REMAINDER TO SURVIVING CHILDREN. — A testator devised land to his daughter for life, "and at the time of her decease to her surviving children equally share and share alike" in fee. *Held*, that a remainder vested at the testator's death in the daughter's children then living. *In re Twaddell*, 110 Fed. Rep. 145 (Dist. Ct., Del.).

The land being in Pennsylvania, the court follows a Pennsylvania decision that the word "surviving" in this connection means surviving the testator, not the life-tenant. *Ross* v. *Drake*, 37 Pa. St. 373. This construction is supported by one English case. *Doe* v. *Prigg*, 8 B. & C. 231. The cases, however, on which that decision was founded have since been overruled, and the decision itself is discredited accordingly by numerous judicial expressions. See *Neathway* v. *Reed*, 3 De G. M. & G. 18; *In re Gregson*, 2 De G. J. & S. 428. As to a devise of the precise form set out above, no American decision found adopts the Pennsylvania construction and several reject it. *Slack* v. *Bird*, 23 N. J. Eq. 238; *Cheatham* v. *Gower*, 94 Va. 383. One case applied that construction to a remainder devised to the testator's surviving children. *Grimmer* v. *Friederich*, 164 Ill. 245. Contrary decisions are numerous. *Coveny* v. *McLaughlin*, 148 Mass. 576. In these cases if the word "surviving" is referred to the testator's death it is superfluous. They are in that respect distinguishable from the principal case, where "surviving" might have been inserted to exclude children born after the testator's death. As a matter of good sense, however, the testator's intention is, it is submitted, more correctly read by the authorities which oppose *Ross* v. *Drake*, *supra*.

PROPERTY — SALE BY ONE ENTRUSTED WITH POSSESSION — CERTIFICATE OF INDEBTEDNESS INDORSED IN BLANK — BREAKING BULK. — The plaintiff left with brokers for safe keeping an envelope containing certificates of indebtedness of a city, indorsed in blank. The brokers sold the certificates to an innocent purchaser. *Held*, that the purchaser did not get title. *Scollans* v. *Rollins*, 60 N. E. Rep. 983 (Mass.).

See NOTES, p. 403.

PROPERTY — VENDOR'S LIEN UPON REAL ESTATE — WAIVER. — The defendant, acting as his wife's agent, obtained from the plaintiff a conveyance of real estate to the wife's appointees, giving as part of the consideration his own promissory note with sureties. *Held*, that the vendor's lien is thereby waived. *Shrimsher* v. *Newton*, 64 S. W. Rep. 534 (I. T.).

About half of the states have accepted the English doctrine allowing an equitable vendor's lien on realty. See 2 JONES, LIENS, 2nd ed., § 1063. This lien is commonly said to be based on a natural equity, and to exist by implication of law unless a contrary intention is manifested by the parties. *Mackreth* v. *Symmons*, 15 Ves. 329. But what will suffice to show a contrary intention is much disputed. See 3 POM., Eq. JUR., § 1251. American courts generally infer from the acceptance of the personal obligation of a third person either a conclusive or a presumptive waiver of the lien. *Boynton* v. *Champlin*, 42 Ill. 57; see *Hunt* v. *Marsh*, 80 Mo. 396; *contra*, *Grant* v. *Mills*, 2 Ves. & B. 306. It is doubtful whether such an inference is well founded. See *Kauffelt* v. *Bower*, 7 S. & R. 64, 77. But the wisdom of recognizing such liens at all is questionable, for the policy of our law as illustrated by the registry system is opposed to secret and uncertain encumbrances. See *Ahrend* v. *Odiorne*, 118 Mass. 261. The restriction of the doctrine, therefore, is not to be regretted. Where the third person is really the purchaser, although the conveyance runs to his wife, the acceptance of his note is no waiver. *Hunt* v. *Marsh*, *supra*; *contra*, *Andrus* v. *Coleman*, 82 Ill. 26. The principal case, however, in which the defendant acted solely as agent, falls within the general rule.

SALES — BAILMENT WITH OPTION TO BUY — OWNER'S REMEDY UPON TOTAL REPUDIATION. — In a written agreement the plaintiff promised to the defendant the use of a certain piano for the next nine months, for which the defendant promised to pay $25 cash and $250 in specified unequal instalments; the plaintiff further agreeing to give the defendant, for three months after the period mentioned, the option to buy for $25 more. The writing referred to the agreement as a lease, and stated the value of the piano as $300. The defendant refused the piano when possession was tendered, and was sued for the first $25 before the date set for the second payment. *Held*, that the plaintiff may recover the first payment in full. *Gray* v. *Booth*, 64 N. Y. App. Div. 231.

If the transaction was, as the court treats it, the usual conditional sale, in which the seller retains title merely for security, the plaintiff may properly recover the full price in instalments, exactly as if he had given title and taken it back by way of mortgage. *Marvin Safe Co.* v. *Emanuel*, 14 N. Y. St. Rep. 681. If a sale in substance, it will be so treated though in form a lease. *Murch* v. *Wright*, 46 Ill. 487. The objection, however, is conclusive that since there was no promise to pay the price, there was no sale. *McCall* v. *Powell*, 64 Ala. 254. Perhaps the case was thought analogous to those where one who contracts to buy and later refuses to take title is liable for the full price. This rule practically gives specific performance at law; but it was early recognized in New York and is there freely applied. *Bement* v. *Smith*, 15 Wend. (N. Y.) 493; *Hayden* v. *Demets*, 53 N. Y. 426. In cases purely of sale, it forces on the defendant what he agreed to buy, namely, the title to the chattel. This effect, necessary to justify the rule, is impossible where, as in the principal case, the subject of the defendant's purchase is the actual use of a chattel. Therefore neither of the rules discussed, apparently the only ones available for the purpose, suffices to support the decision.

STATUTE OF LIMITATIONS — PART PAYMENT BY ADMINISTRATOR. — A payment was made by an administrator upon a debt owed by his intestate, but barred by the Statute of Limitations. There was no express promise by the administrator to pay the balance. *Held*, that this is sufficient to take the debt out of the statute. *Slattery* v. *Doyle*, 61 N. E. Rep. 264 (Mass.).

In some jurisdictions an executor or administrator has no power to affect the operation of the statute. *Henderson* v. *Ilsley*, 19 Miss. 9. Massachusetts and a few other states give to the acts of an executor the same effect as if done by a debtor. *Foster* v. *Starkey*, 12 Cush. (Mass.) 324; *Shreve* v. *Joyce*, 36 N. J. Law 44. Between these two extremes there are several intermediate views, involving numerous distinctions. See *Patterson* v. *Cobb*, 4 Fla. 481; *Ray* v. *Strickland*, 89 Ga. 840; *Woods* v. *Irwin*, 141 Pa. St. 278. In England and some American states where an executor may control somewhat the effect of the statute, an express promise is required; and acknowledgments by an executor that would be sufficient if made by a debtor, are held insufficient

to bind the estate. *Oakes* v. *Mitchell*, 15 Me. 360; *Tullock* v. *Dunn*, Ry. & M. 416. In one case a part payment by an executor was held not to imply a promise to pay the balance, the question being treated as one of reasonable inference. *McLaren* v. *McMartin*, 36 N. Y. 88. In view of the Massachusetts doctrine, the decision in the principal case was to be expected, but it would seem the sounder policy to limit, if not to deny altogether, the power of the administrator to affect the operation of the statute. See 11 HARV. L. REV. 129.

TORTS — CONSPIRACY — MONOPOLY. — *Held*, that a declaration alleging that the defendants agreed to deal with each other and no one else, for the purpose, among others, of driving the plaintiff out of business, and that such result was accomplished, states a cause of action at common law. *Hawarden* v. *Youghiogheny Co.*, 87 N. W. Rep. 472 (Wis.). See NOTES, p. 402.

TORTS — IMPUTED NEGLIGENCE — SUIT BY CHILD. — A child of fifteen was injured by the negligence of the defendants, the father contributing to the accident by his carelessness. *Held*, that the negligence of the father is not imputable to the child so as to bar her recovery. *Ives* v. *Welden*, 87 N. W. Rep. 408 (Ia.).

In rejecting the doctrine of imputed negligence, the decision is in line with the modern tendency. *Wymore* v. *Mahaska County*, 78 Ia. 396; *Warren* v. *Manchester St. Ry. Co.*, 47 Atl. Rep. 735. But some jurisdictions, in cases of the child's death, have barred suits in which the negligent parent, if not the direct beneficiary, will eventually be the main gainer, on the ground that the real beneficiary should not be rewarded through his own fault. *Bamberger* v. *Citizens' St. Ry. Co.*, 95 Tenn. 18. This objection is of considerable weight even when the child survives, and suit is brought by him or for his benefit, since as a matter of practical experience, it is generally the parents who profit most by the recovery of the child. Still the child would usually derive some benefit from the damages recovered, and to this he should be entitled. The possibility of rewarding a negligent parent would be rather a weak ground on which to deny any remedy to the injured child. The decision in the principal case, then, seems to reach the right result.

TORTS — STATUTORY NUISANCE — RIGHT TO ABATE. — A statute declared any place where intoxicating liquors were sold a public nuisance, and provided that any citizen of the county in which such a nuisance existed might bring a suit in the name of the state to abate and enjoin the same. *Held*, that this statute does not justify a citizen in demolishing such a place. *State* v. *Stark*, 66 Pac. Rep. 243 (Kan.).

A private individual may abate a public nuisance only when it is also a private nuisance as to him, or incommodes him more than the rest of the public. See *Brown* v. *Perkins*, 12 Gray (Mass.) 89; WOOD, NUIS., 3rd ed., § 733. The statutory provision in the principal case does not make the offence a private nuisance as regards the citizen instituting the suit, so as to give him the right to abate, for it is expressly provided that the proceedings shall be in the name of the state. In Iowa, a similar statute allows the action to be brought in the citizen's name, and in Massachusetts it may be brought in the form of a petition by ten legal voters. In all these cases where private individuals may sue in their own names to enjoin what is solely a public nuisance, they must be regarded as special state's attorneys *quoad hoc*, mere public agencies to set the law in motion. See *Carleton* v. *Rugg*, 149 Mass. 550, 554. The principal decision is in accord with the authorities. *Brown v. Perkins*, *supra*.

TRUSTS — BENEFICIARIES OF INSURANCE POLICY AS TRUSTEES. — A guardian insured his life in the name of his wards, for the declared purpose of protecting his wards and his bondsmen from any loss to the estate of the wards. The guardian died, having squandered the estate. The new guardians collected the insurance, and then sued the sureties on the bond. The defendants contended that the policy was held in trust primarily for them, and that the fund collected should be applied to discharge their liabilities. *Held*, that there was no such trust, and that the defendants are liable. *Herring* v. *Sutton*, 39 S. E. Rep. 772 (N. C.).

There is much authority supporting the statement of the court that the wards took a vested property right in the policy, so that the policy and the money due under it belonged at law to them. *Central Bank, etc.*, v. *Hume*, 128 U. S. 195. But this right was given them by the guardian, and the reason why he could not impose a trust upon it is not very evident. It has been held that a beneficiary of a life policy may be

trustee of it to the amount it exceeds his interest in the life of the insured, so as to be able to recover the full sum from the insurer. *American, etc., Co.* v. *Robertshaw*, 26 Pa. St. 189. Moreover choses in action, whether equitable or legal, may be assigned in trust, and an assignment absolute on its face may be shown to have been subject to a trust. *Way's Trusts*, 2 De G. J. & S. 365; *Denton* v. *Peters*, L. R. 5 Q. B. 475. It is true that in the principal case the donor never took title to the subject of the gift. But, though no case exactly like this has been found, on principle there seems no reason why he should on this account be less able to declare a trust.

TRUSTS — CONSTRUCTIVE TRUSTS — BUCKET SHOP TRANSACTIONS WITH TRUST FUNDS. — A trustee misappropriated trust money and delivered it to the defendants, proprietors of a bucket shop, to be used in gambling transactions, which were illegal by statute. A certain amount was returned to the trustee as profits. The defendants had no notice of the trust. *Held*, that the *cestui que trust* may recover the whole amount delivered to the defendants, without deducting the sum returned to the trustee. *Bendinger* v. *Central, etc., Exchange*, 109 Fed. Rep. 926 (C. C. A., Seventh Circ.). See NOTES, p. 404.

TRUSTS — PROCEEDS OF INSUFFICIENT SECURITY — PRINCIPAL AND INCOME. — A testator devised property in trust to pay the income to A for life, and then in trust for B. The property included a mortgage which the trustee was obliged to foreclose. The proceeds of the foreclosure sale fell short of the amount of the principal, and there was also due a considerable sum as back interest. *Held*, that the amount realized is to be apportioned to principal and interest in the ratio of the amounts due from the mortgagee under those respective heads. *In re Alston*, [1901] 2 Ch. 584.

Only one similar case has been found treating the entire sum as principal. *In re Grabowski*, L. R. 6 Eq. 12. But at least three different rules of apportionment have been followed in England. One of these apportions as principal that sum which, put at interest for the period during which interest was unpaid, would, at the usual rate for trust estates, have amounted to the sum recovered. *Cox* v. *Cox*, L. R. 8 Eq. 343. Another rule adds the interest previously received to the amount realized on foreclosure, and apportions this total sum in the ratio of the original principal to the interest for the entire period, debiting the life tenant with the interest received. *In re Foster*, 45 Ch. D. 629. The principal case adopts the third rule, following *In re Moore*, 54 L. J. Ch. 432. Authority in the United States is divided between the first and third rules. *Roosevelt* v. *Roosevelt*, 5 Redf. (N. Y.) 264; *Hagan* v. *Platt*, 48 N. J. Eq. 206; see also *Kinmoth* v. *Brigham*, 5 Allen (Mass.) 270. The rule of the principal case seems based on the true nature of the transaction. The claim filed upon foreclosure included principal and interest, and the amount recovered should be divided proportionally to the amounts due under those heads.

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# BOOKS AND PERIODICALS.

THE TEST OF CONSIDERATION. — In the first edition of his work on Contracts, Sir Frederick Pollock contended that performance of an obligation due one party could neve be regarded as consideration for a contract with another party, since in contemplation of law it constituted no detriment, but that a promise to perform an act already due another, since it created a new right, might be so regarded. POLL., CONT'S, 1st ed., 158, 159. As examples of this later class, he cited *Shadwell* v. *Shadwell*, 9 C. B. N. S. 158, and *Scotson* v. *Pegg*, 6 H. & N. 295. In later editions he receded from this position, and seemed to doubt the validity of both performance and promise. POLL., CONT'S, 6th ed., 175–177. In a recent article, consisting of passages intended for the forthcoming seventh edition of his book, he has clearly retaken his first position, and in addition has recognized *Shadwell* v. *Shadwell*, *supra*, and *Scotson* v. *Pegg*, *supra*, as cases of the performance of, as distinguished from the promise to perform, a preëxisting obligation. *Afterthoughts on Consideration*, by Sir Frederick Pollock. 17 L. Quart. Rev. 415 (Oct., 1901).